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RICHARD W. WIEKING
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NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ENVIRONMENTAL PROTECTION
INFORMATION CENTER, a non-profit
corporation,

No. C 01-2821 MHP

Plaintiff,

v.

PACIFIC LUMBER COMPANY, a Delaware
corporation; SCOTIA PACIFIC COMPANY
LLC, a Delaware corporation;
ENVIRONMENTAL PROTECTION
AGENCY, a federal agency; and CHRISTINE
TODD WHITMAN, in her capacity as EPA
Administrator,

Defendants.

Order
Motion to Certify for Immediate Appeal

On July 24, 2001, plaintiff Environmental Protection Information Center ("EPIC"), a non-profit environmental organization, brought a citizen-suit action under section 505(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a), against Pacific Lumber Company and Scotia Pacific Lumber Company (collectively "PALCO"), the Environmental Protection Agency ("EPA"), and Christine Todd Whitman as EPA Administrator.¹ EPIC's complaint alleges that PALCO violated the CWA, the Porter-Cologne Act, and California's Unfair Competition Law, Cal. Bus & Prof. Code § 17200 *et seq.*, when it discharged pollutants without a CWA permit. For these alleged violations, EPIC seeks declaratory and injunctive relief, civil remedies, and restitution.

On August 16, 2001, the court denied EPIC's motion for a temporary restraining order. PALCO and EPA subsequently filed separate motions to dismiss the action, and EPIC, in response, filed an amended complaint on September 24, 2001, adding a third claim challenging the nonpoint

1 source provision of the relevant regulation. On June 6, 2003, the court denied EPA's motion to
2 dismiss and denied PALCO's motion to dismiss in part, concluding that EPIC could pursue a claim
3 under the Administrative Procedures Act ("APA") in this court and that EPIC's claim was not time-
4 barred. On October 13, 2003, the court denied EPIC's motion for summary judgment on its third
5 claim for relief, granting PALCO's and EPA's cross-motions and construing the relevant EPA
6 regulation in a manner consistent with germane federal law. On January 23, 2004, the court denied
7 PALCO's motion to dismiss EPIC's remaining claims under Federal Rule of Civil Procedure
8 12(b)(6).

9 Now before the court is PALCO's motion for certification for interlocutory appeal of the
10 court's three most recent decisions in this matter. See 28 U.S.C. § 1292(b). The court has
11 considered the parties' arguments fully, and for the reasons set forth below, the court rules as
12 follows.

13
14 BACKGROUND²

15 In each of its prior decisions, the court has set forth the background of this action in
16 significant detail, and, for the motion before the court, it is not necessary to restate all of that
17 background here. The court, rather, need only reframe the core dispute and briefly summarize the
18 three relevant court decisions. At the heart of this litigation is Bear Creek, a brook situated several
19 miles upstream of Scotia, California. A tributary of the Eel River, Bear Creek creates a watershed
20 that covers 5500 acres of land throughout Humboldt County, California. Pacific Lumber Company
21 and its wholly owned subsidiary, defendant Scotia Pacific Lumber Company, own some ninety-five
22 percent of the land in the Bear Creek watershed, much of which PALCO uses for logging.³

23 According to EPIC, substantial logging activity (primarily PALCO's) in the watershed area
24 has spurred a dramatic increase in the amount of sediment deposited in Bear Creek. Before
25 significant logging began, EPIC claims, Bear Creek's sediment deposit peaked at approximately
26 8,000 tons per year; after logging practices commenced, sediment deposit climbed to 27,000 tons per
27 year. This sediment increase, EPIC alleges, has a specific source: PALCO's timber harvesting and
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1 construction of unpaved roads. According to EPIC, PALCO's logging activity creates a deleterious
2 environmental process. First, EPIC notes, timber harvesting removes vegetation from the ground
3 surface, making soil more susceptible to erosion and landslides; construction of unpaved roads then
4 exposes more soil, which, in turn, further destabilizes slopes. The effect of timber harvesting and
5 road construction, EPIC contends, is to expose far more destabilized soil than is environmentally
6 sustainable. When it rains, EPIC explains, the rain water carries the exposed silts and sediments—as
7 well as other pollutants, like pesticides and diesel fuel—into culverts, ditches, erosion gullies, and
8 other alleged channels. From these various channels, silts, sediments, and pollutants flow directly
9 into Bear Creek. The consequences of PALCO's drainage system, EPIC notes, are predictable and
10 environmentally adverse; PALCO's present and future timber harvest plans, EPIC adds, promise
11 only to make the situation worse.

12 EPIC believes PALCO's present drainage system violates various provisions of the Clean
13 Water Act, including (but not necessarily limited to) the National Pollutant Discharge Elimination
14 System ("NPDES"). See 33 U.S.C. §§ 1251(a), 1311(a), 1342(a); see also Environmental Def. Ctr.
15 Inc. v. United States Env'tl. Prot. Agency, 345 F.3d 840, 2003 WL 22119563, *2 (9th Cir. 2003);
16 Association to Protect Hammersley v. Taylor Res., Inc., 299 F.3d 1007, 1016 (9th Cir. 2002) (noting
17 that, in 1972, "Congress passed the Clean Water Act amendments, 33 U.S.C. §§ 1251–1387, to
18 respond to environmental degradation of the nation's waters"); Natural Resources Defense Council
19 ("NRDC") v. EPA, 822 F.2d 104, 109 (D.C. Cir. 1987) (citing 33 U.S.C. § 1311(a)) NRDC v. EPA,
20 822 F.2d at 110 (noting that, when necessary, water quality-based standards may supplement
21 technology standards). In substantial part, EPIC alleges that PALCO has used a variety of "point
22 sources," see 33 U.S.C. § 1362(14), to discharge pollutants without first securing necessary NPDES
23 permits. Cf., e.g., League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1183 (9th Cir. 2002)
24 ("Point source pollution is distinguished from 'nonpoint source pollution, which is regulated in a
25 different way and does not require [the NPDES] type of permit.'). Absent such permits, EPIC
26 claims, PALCO's system conflicts with defendants' CWA obligations.

1 In an effort to compel PALCO to comply with the putative terms of the CWA, EPIC brought
2 a citizen-suit action under section 505(a) of the CWA, 33 U.S.C. § 1365(a), against PALCO, EPA,
3 and then-EPA Administrator Christine Todd Whitman. EPIC's first two causes of action allege,
4 generally stated, that PALCO drainage system employs a number of unpermitted "point sources" to
5 discharge pollutants; EPIC later added a third cause of action, alleging that the adoption of a
6 particular EPA regulation—viz., 40 C.F.R. section 122.27⁴—constituted an *ultra vires* act. A
7 number of potentially dispositive motions followed.

8 On June 6, 2003, the court denied EPA's motion to dismiss and denied PALCO's motion to
9 dismiss in part, concluding that EPIC could pursue a claim under the Administrative Procedures Act
10 ("APA") in *this* court and that EPIC's claim was not time-barred. On October 14, 2003, the court
11 denied EPIC's motion for summary adjudication on its third claim for relief, granting EPA's and
12 PALCO's cross-motions for summary adjudication and reading 40 C.F.R. section 122.27 to be
13 consistent with the governing provisions of the CWA. And, on January 23, 2004, the court denied
14 PALCO's motion to dismiss EPIC's remaining claims (that is, its first and second claims for relief)
15 under Federal Rule of Civil Procedure 12(b)(6). PALCO has now requested that the court certify
16 each of these three decisions for immediate appellate review under 28 U.S.C. section 1292(b).

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18 DISCUSSION

19 The test for whether to grant a motion to certify a decision for interlocutory appeal under
20 section 1292(b) is, by now, a familiar one.⁵ For a district court decision to warrant immediate
21 interlocutory review, that decision must "involve[] a controlling question of law as to which there is
22 substantial ground for difference of opinion and that an immediate appeal from the order may
23 materially advance the ultimate termination of the litigation." See 28 U.S.C. § 1292(b). Courts have
24 parsed section 1292(b) into a three-part test, see, e.g., Loritz v. CMT Blues, 271 F. Supp. 2d 1252,
25 1253–54 (S.D. Cal. 2003) (assessing (1) whether a decision involves a controlling issue of law; (2)
26 whether there exists a substantial ground for difference of opinion; and (3) whether immediate
27 appeal may speed ultimate resolution of the case), cautioning that interlocutory appeals are not
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1 appropriate “merely to provide review of difficult rulings in hard cases.” United States Rubber Co.
2 v. Wright, 359 F.2d 784, 785 (9th Cir. 1966). Instead, interlocutory appeals under section 1292(b)
3 are to be permitted “sparingly,” i.e., only in “exceptional” and “extraordinary” circumstances. See
4 James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1068 n.6 (9th Cir. 2002) (noting that such
5 certification is appropriate only “in rare circumstances”); United States Rubber Co., 359 F.2d at 785;
6 United States v. Woodbury, 263 F.2d 784, 788 n.11 (9th Cir. 1959); Rottmund v. Continental Assur.
7 Co., 813 F.Supp. 1104, 1112 (E.D. Pa.1992) (noting that section 1292(b) demands nothing less than
8 “exceptional circumstances [to] justify a departure from the basic policy against piecemeal litigation
9 and of postponing appellate review until after entry of a final judgment”). Decisions regarding
10 whether or not to certify an order for appeal rest within the sound discretion of the district court, see,
11 e.g., Loritz, 271 F. Supp. 2d at 1253–54; still, the court of appeals retains the authority to reject a
12 interlocutory appeal certified by the district court, and it “does so quite frequently.” See James, 283
13 F.3d at 1068 n.6.⁶

15 The court does not believe that any of the three challenged orders merit interlocutory review,
16 nor is the court convinced that the Ninth Circuit would accede to such review were this court to
17 allow it. Cf. Chiron Corp. v. Abbott Labs., 1996 WL 15758, *2–3 (N.D. Cal. 1996) (Patel, J.).
18 Neither party disputes, of course, that each of the three relevant dispositions present—and
19 resolve—“controlling question[s] of law.” 28 U.S.C. § 1292(b). The court’s June 6, 2003, opinion
20 confirms that this court has jurisdiction to hear part of EPIC’s complaint; the court’s October 14,
21 2003, opinion finds that section 122.27 is not an *ultra vires* provision; and the court’s January 23,
22 2004, order assures that PALCO’s “point sources”—to the extent they exist—must comply with the
23 terms of the NPDES and the CWA. Section 1292(b)’s “controlling issue of law” language has long
24 been construed broadly, see, e.g., In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982)
25 (noting that an issue qualifies as a “controlling” one if its resolution “materially affect[s]” the
26 outcome of an action), and all three dispositions fit within this expansive standard.
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1 Nor does either party clearly dispute that *reversal* of any of this court’s orders might “speed”
2 the ultimate disposition of this action. See 28 U.S.C. § 1292(b).⁷ All three of the relevant decisions
3 were, in some fashion, potentially dispositive: the first because it discussed—and confirmed—this
4 court’s jurisdiction to hear particular portions of EPIC’s complaint; the second because it eliminated
5 EPIC’s third claim for relief; and the third because it concluded (again) that EPIC had stated two
6 claims on which relief could be granted. Reversal of any of the three court decisions might speed the
7 ultimate resolution of this litigation, or at least a good portion of it. Id.

9 To PALCO, this is enough to justify immediate interlocutory review. But PALCO’s
10 interpretation of section 1292(b) is both incomplete and overbroad. Every denial of a dispositive
11 motion *may* result in a reversal at the appellate court, which *may*, in turn, conclude the case outright.
12 Under PALCO’s expansive reading of section 1292(b), nearly all denials of potentially dispositive
13 interlocutory orders (e.g., summary adjudication, failure to state a claim) would be immediately
14 appealable. Neither the statute nor existing precedent demand such a result. As the Ninth Circuit
15 has long reminded, it is not enough to say that appellate reversal of a particular decision might
16 dispose of an action (i.e., “speed ultimate resolution”). See, e.g., James, 283 F.3d at 1068 n.6. This
17 is true even where, as here, the remaining issues may be difficult and proceeding to trial may be
18 somewhat costly. See United States Rubber Co., 359 F.2d at 785.

21 And this is doubly true where, as here, the putative “substantial ground for difference of
22 opinion” is significantly overstated. See 28 U.S.C. § 1292(b). Neither party argues, and the court
23 does not mean to suggest, that there is absolutely *no* ground for difference of opinion regarding the
24 court’s relevant decisions. If nothing else, the length, detail, and vigor of PALCO’s moving papers
25 prove that there is a difference of a kind. But PALCO’s protests do not show that there is a
26 “substantial ground for difference of opinion” *among the courts*. See 28 U.S.C. § 1292(b). They
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1 show, rather, that there is a difference of opinion *between PALCO and this court*—and that PALCO
2 would like the court to revisit the many, often intricate arguments EPIC, PALCO, and EPA
3 articulated when litigating the predicate motions. See, e.g., PALCO’s Motion, at 12–14 (arguing
4 only that, in the October 14, 2003, opinion, the court extended a particular Ninth Circuit rationale
5 too far). This is not the kind of “difference” section 1292(b) targets, and PALCO’s reiteration of
6 previously stated arguments—however forceful—is no surrogate for a demonstration of a legitimate
7 and “substantial ground for difference of opinion” between and among judicial bodies. See United
8 States Rubber Co., 359 F.2d at 785; APCC Services, Inc. v. AT & T Corp., 297 F. Supp. 2d 101, 107
9 (D.D.C. 2003.) (“A substantial ground for dispute [] exists where a court’s challenged decision
10 conflicts *with decisions of several other courts.*”) (emphasis added); Judicial Watch, Inc. v. Nat’l
11 Energy Policy Dev. Group, 233 F. Supp. 2d 16, 31 (D.D.C. 2002) (“[D]efendants’ conviction of the
12 correctness of their position is insufficient to carry them over the high threshold posed by the
13 standard governing certification for interlocutory appeal.”).

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16 To be sure, PALCO cites a string of federal cases, most of which this court cited in its
17 relevant decisions—but all of which supposedly confirm the requisite difference of opinion. See,
18 e.g., Env’tl. Defense Ctr. v. EPA, 344 F.3d 832 (9th Cir. 2003); Longview Fibre Co. v. Rasmussen,
19 980 F.2d 1307 (9th Cir. 1992); NRDC v. EPA, 966 F.2d 1292 (9th Cir. 1992). When read closely,
20 however, none of the relevant cases actually differ—in logic or effect—from this court’s orders.⁸
21 Rather, PALCO’s catalog of cases simply rephrases *PALCO*’s disagreement with the court, albeit in
22 a novel and more abstruse fashion. See, e.g., PALCO Motion, at 4 (attempting to establish the
23 necessary “difference” by arguing that this court construed some caselaw in an “unduly cramped”
24 manner). PALCO may disagree with the way the court has interpreted the relevant doctrine, but “at
25 least one party [is always] convinced that the court got it wrong.” See Chiron Corp., 1996 WL
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1 15758, at *3. Such disagreement is *not* tantamount to a disagreement among the courts, and it does
2 not itself compel section 1292(b) review. Id. If it did, nearly “every judgment would give rise to an
3 interlocutory appeal.” Id.

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5 All of this court’s decisions have been careful and methodical. The parties’ motions have
6 presented difficult questions, and the court does not pretend that the answers were always easy to
7 divine. Still, the fact that the court’s decisions were neither easy nor obvious is not sufficient reason
8 to certify an immediate interlocutory appeal. See United States Rubber Co., 359 F.2d at 785.
9 Certification for interlocutory review is appropriate only in “exceptional” or “extraordinary”
10 circumstances, not simply where issues are hard or questions are somewhat new. See Coopers &
11 Lybrand v. Livesay, 437 U.S. 463, 474 (1978); James, 283 F.3d at 1068 n.6; 28 U.S.C. § 1292(b).
12 This action is a challenging one, but it is not in this sense “exceptional.” None of the three
13 challenged orders satisfy section 1292(b)’s requirements, and, as a result, interlocutory review is not
14 appropriate.
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18 CONCLUSION

19 PALCO’s motion to certify three of the court’s decisions for interlocutory review under 28
20 U.S.C. section 1292(b) is DENIED.

21 IT IS SO ORDERED.

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23 Dated:

24 *April 19, 2004*


MARILYN HALL PATEL

Chief Judge

United States District Court

Northern District of California

ENDNOTES

1. Pursuant to Federal Rule of Civil Procedure 25(d)(1), Michael Leavitt, new Administrator of EPA, automatically replaces his predecessor in this suit. See Fed. R. Civ. P. 25(d)(1).

2. Unless otherwise noted, this fact recitation is culled from the parties' moving papers.

3. Both Pacific Lumber and Scotia Pacific Lumber Company are Delaware corporations; both maintain principal places of business in Scotia, California.

4. In significant part, the current regulation defines a "[s]ilvicultural point source" as:

any discernible, confined, and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. *The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.*

40 C.F.R. § 122.27(b)(1) (emphasis added).

5. At the outset, the court must question PALCO's right to appeal all three of the challenged decisions. As the Ninth Circuit has long suggested, the right to appeal generally redounds to the party aggrieved by a particular decision. See, e.g., United States v. Good Samaritan Church, 29 F.3d 487, 488 (9th Cir. 1994). This court's October 2003 opinion does not leave PALCO as an aggrieved party; in fact, that opinion expressly grants *PALCO's* motion for summary judgment and denies EPIC's cross-motion. With respect to that opinion, all PALCO endeavors to challenge is a rationale it dislikes—and the appellate process greatly disfavors such attempts. *Id.* Even so, because section 1292(b) provides a simpler answer to PALCO's motion, the court will decide this motion on the basis of that section instead.

6. By contrast, a district court's denial of a motion to certify a decision for immediate appeal under section 1292(b) is not reviewable by the appellate court. Executive Software N. Am., Inc. v. United States, 24 F.3d 1545, 1550 (9th Cir. 1994).

7. EPIC argues that an immediate appeal by PALCO "has little, if any, likelihood of success on the merits," adding that most civil appeals to the Ninth Circuit take "15 to 23 months" to resolve. EPIC Opp., p. 12. This may all be true, but it is also question-begging, albeit of a mild form. Section 1292(b) directs the court to consider whether immediate appellate review "*may*" speed the ultimate resolution of the litigation. See 28 U.S.C. § 1292(b). Much as the court believes that the Ninth Circuit will affirm this court's many decisions, section 1292(b)'s conditional language has long been read to require courts to consider the effect of immediate review and *reversal*, not just review. To this end, the court must assess whether immediate appellate court reversal will speed the outright

1 disposition of this action (even if this conflates the “controlling issue” analysis with the “speed
2 disposition” one). The likelihood of success on the merits, and the typical lifespan of an appeal, do
3 not answer the relevant question. Nor do EPIC’s claims that the trial might be short or that the court
of appeals would benefit from a fully developed record.

4 8. Two cases do interpret section 122.27 differently than has this court, though neither is binding
5 precedent. See Newton County Wildlife Ass’n v. Rogers, 141 F.3d 803 (8th Cir. 1998); Sierra Club
6 v. Martin, 71 F. Supp. 2d 1268 (N.D. Ga. 1999). Binding precedent, in fact, demands that this court
7 *ignore Rogers and Martin*. Quite recently, the Ninth Circuit expressly disagreed with Rogers and
8 Martin, reading section 122.27’s catalog of silvicultural point sources to be illustrative, not
exhaustive. See Forsgren, 309 F.3d at 1188 n.7. Even more recently, the Supreme Court held that “a
9 point source need not be the original source of the pollution,” thus confirming the correctness of this
10 court’s “point source” understanding. See South Florida Water Mgmt. Dist. v. Miccosukee Tribe,
541 U.S. __; Slip Op. at 7. To the extent any court “difference” exists, then, it is a difference is
11 mandated by two notable sources (viz., the Ninth Circuit and the Supreme Court), and it does not
justify immediate appellate review.